

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT LEE DEFOY,
PETITIONER

V

SUPERINTENDENT JOHN M.
McCULLOUGH, ATTORNEY GENERAL
D. MICHAEL FISHER,
PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
RESPONDENTS

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:
:
: CA. NO. 00-11 ERIE
: DISTRICT JUDGE McLAUGHLIN
: MAGISTRATE JUDGE BAXTER
:
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:
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DEPOSITION OF: BENJAMIN MARTINEZ

TAKEN BY: PETITIONER

BEFORE: DONNA E. GLADWIN, RPR
NOTARY PUBLIC

DATE: NOVEMBER 9, 2006, 1:59 P.M.

PLACE: PENNSYLVANIA BOARD OF
PROBATION AND PAROLE
1101 SOUTH FRONT STREET
HARRISBURG, PENNSYLVANIA

APPEARANCES:

BY: THOMAS W. PATTON, ASSISTANT FEDERAL PUBLIC DEFENDER
FOR - PETITIONER

OFFICE OF THE ATTORNEY GENERAL
BY: SCOTT A. BRADLEY, SENIOR DEPUTY ATTORNEY GENERAL

FOR - RESPONDENT



WITNESS

NAME

EXAMINATION

BENJAMIN MARTINEZ

BY MR. PATTON

3

BY MR. BRADLEY

40

EXHIBITS

EXHIBIT NO.

PRODUCED AND MARKED

A. PAGE FROM PROCEDURE MANUAL

27

STIPULATION

It is hereby stipulated by and between counsel for the respective parties that reading, signing, sealing, certification and filing are hereby waived; and that all objections except as to the form of the question are reserved to the time of trial.

BENJAMIN MARTINEZ, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PATTON:

Q Could you tell us your name, please?

A Benjamin A. Martinez.

Q My name is Tom Patton. I represent Robert DeFoy, who's the Petitioner in the case that we're here on today.

A Okay.

Q I'm going to be asking you a series of questions. If you don't understand any of my questions, just please ask me to repeat them or to try and clarify.

A All right.

Q Okay. How are you currently employed?

A I'm currently a board member.

Q With the Pennsylvania --

A Pennsylvania Board of Probation and Parole.

1 Q How long have you been a board member?

2 A I'm serving my second six-year term that commenced
3 July of 2005.

4 Q Okay.

5 A I don't have the exact date. Sorry.

6 Q Okay. So you've been with the Board a little over
7 -- you've been a Board member for --

8 A I've been a Board member. This is my second term.

9 Q So somewhere over six years? So seven, eight
10 years?

11 A Give or take.

12 Q Okay. Did you have any positions with the Board
13 before you became a member?

14 A I've had a variety of positions, and I believe I
15 began employment May of 1984. I've worked as a parole
16 agent, hearing examiner, parole supervisor, as chairman of
17 the parole Board, and as chief hearing examiner.

18 Q As a Board member could you give us, in general, a
19 break down of what your responsibilities are?

20 A My primary responsibilities are making decisions as
21 to the parole or reparole of inmates in the Department of
22 Corrections. I'm also involved in the policy making end of
23 the agency. Those are probably my primary responsibilities.

24 Q Okay. With regard to making parole or reparole
25 decisions, could you explain the process that you go

1 through, just in general terms, of addressing a case and the
2 steps that you go through in making the ultimate decision of
3 whether or not an inmate will be paroled or reparaoled?'

4 A Okay. I'll try to generally describe that.
5 Generally I'm presented with a case that has been prepared
6 by our institutional parole staff and with documentation
7 provided from a variety of sources, including the Department
8 of Corrections or county facilities. And it's in line with
9 the requirements of Act 19 of the Parole Act. I won't go
10 into the detail on that, but generally there's documentation
11 prepared for me.

12 There's the actual case folder that I have before
13 me. I generally make some preparatory notes and either
14 interview the person in person, either through video
15 conference or through a paper review when I haven't been
16 involved in the interview myself. And I conduct those
17 interviews either in person or in panels of two involving
18 myself and another hearing examiner or in video conferencing
19 involving myself and a hearing examiner.

20 Q And after the interview is concluded do you -- how
21 do you reach your decision on what your recommendations --
22 or what your vote is going to be?

23 A I consider a -- a host of factors, and I cover all
24 the mandatory factors that -- that we're obligated to
25 consider under Section 19 of the Parole Act. And it's tough

1 to give a specific answer because it -- I go on the merit of
2 each individual case.

3 But I consider essentially things such as the
4 offense itself, prior history, his or her comportment while
5 incarcerated, program participation. I can give you a whole
6 laundry list, how the person has presented him or herself at
7 the interview, whether I sense that he or she has exhibited
8 benefits from programs that they participated in, whether
9 there was remorse.

10 I consider recommendations of the sentencing judge,
11 the District Attorney, any input provided by the victims, so
12 forth. And it's tough to give you a -- each case is
13 individual, so it's tough to give you much more than that
14 unless you want me to go through more specifics under Title
15 19.

16 Q Well, Title 19 requires you to look at the type of
17 the offense involved and any adjustments the inmate's made
18 in incarceration and protecting the public, general --
19 general policy considerations that you have to consider,
20 would that be accurate?

21 A Yeah. With the ultimate goal to make an assessment
22 whether there will be a risk to -- or there will be a risk
23 to the public by releasing this offender back into the
24 community. That's the ultimate goal of our assessment of
25 the individual generally.

1 Q Has the Board created guidelines that can be used
2 to at least help in making the parole or reparole decision?

3 A We've had guidelines, and I may be off on some of
4 these dates, since, I believe, 1983. We've had guidelines
5 that we use to assist us in our decision making. We're not
6 bound by those guidelines, but I believe since then we've
7 been using them.

8 They've been revised over the years. But the last
9 revision being, and I'm a little fuzzy on -- on that. I
10 can't recall when we last revised them, but they've been
11 revised over the years. They are in line with -- with the
12 requirements of Title 19, or Section 19 of the Parole Act.

13 But the goal of the -- of our assessment of the
14 case continues to be the public safety interests and whether
15 there are risks to the community.

16 Q When you are reviewing a file and trying to reach
17 your decision as to whether or not you're going to vote for
18 parole or reparole, are the guideline -- the Board's parole
19 or reparole guidelines something that you would generally
20 review and consider in making that decision?

21 A Yes, generally.

22 Q Do you have -- does the Board keep any type of
23 statistics on how often the parole or reparole decision
24 tracks the recommendation of the guidelines?

25 A Yes.

1 Q Generally speaking do you know roughly how often
2 the actual parole or reparole decision tracks the
3 recommendation of the guidelines?

4 A It hovers, I believe, around 80 percent is my
5 understanding. Now, I'm not as specific on that as I used
6 to be, but it's my understanding that it hovers around that
7 percentage. And the intent of the guidelines are to reflect
8 -- generally reflect our practices so that like offenders
9 receive like decisions.

10 Q So would it be fair to say -- well, let me ask you
11 this. Part of your duties you said were making policy type
12 decisions. Would some of those policy decisions be on
13 amending the -- the parole or reparole guidelines and trying
14 to tweak them to come into line with the Board's policies
15 and practices?

16 A Yes, yes.

17 Q And so is it accurate to say when you say that the
18 percentages hover around 80 percent that in roughly 80
19 percent of the cases if the guidelines recommend parole, the
20 person would be paroled; but if the guidelines recommended
21 no parole, they would not be paroled?

22 A Each case is still decided on its individual
23 merits, but I think it's accurate to say that the guidelines
24 generally reflect our practice. So I would think yes.

25 Q Okay. I believe you also mentioned that you get

1 some input from the Department of Corrections --

2 A Correct.

3 Q -- regarding the Department's opinion as to whether
4 or not the inmate should or should not be paroled or
5 reparaoled; is that correct?

6 A Yes.

7 Q In -- is that something that you take into
8 consideration when you are deciding on what your vote is
9 going to be as far as release or non-release?

10 A Yes.

11 Q And is that something -- strike that. In the
12 Department of Corrections, the information that they
13 provide, does that also contain information about
14 programming that the -- the inmate has participated in or
15 has not participated in?

16 A Yes.

17 Q Generally speaking, and I know it's tough, but I
18 just want to keep staying on generally speaking, if the
19 parole guidelines would recommend parole or reparole and the
20 Department of Corrections also would recommend parole or
21 reparole, would -- would it generally be the case that the
22 person would be paroled or reparaoled?

23 A It's tough to say because each case rests on its
24 individual merits. I guess it's tough for me to answer
25 that. But I would think a better than 50/50 chance the

1 results would probably be to parole in that kind of
2 scenario. My hesitation's on the individuality of each
3 case.

4 Q Sure. Is one thing you consider when you're making
5 your decision as to whether or not to release the individual
6 or not to release the individual if -- is whether or not the
7 individual has an approved home plan to be released to?

8 A Yes.

9 Q If the inmate does not have an approved release
10 plan, would you feel comfortable in voting to release the
11 individual?

12 A Again, it depends on -- on the case. In some -- in
13 some cases, again, case by case, that would be an important
14 consideration. In others we could parole directly to a
15 community correction center. So, again, my hesitation is on
16 the uniqueness of each case.

17 Q Do you guys have the ability to direct parole to a
18 -- to a community confinement center?

19 A Right.

20 Q For however period -- period of time you feel is
21 necessary for that person to be there?

22 A We generally leave the period of time up to the
23 Department of Corrections, but in certain individual cases
24 we designate a minimum amount of time at such a facility.
25 We can also parole directly to an in-patient facility, drug

1 and alcohol facility, mental health facility, that sort of
2 thing.

3 Q In the parole revocation and then reparole context
4 --

5 A Um-hum.

6 Q -- would it be accurate to say that when someone
7 has their parole revoked that they will get what's generally
8 referred to as a green sheet documenting the Board's action
9 revoking their parole?

10 A Yes.

11 Q If the Board feels it appropriate, can the Board
12 direct in the green sheet revoking parole particular
13 programs the Board would like to see the inmate participate
14 in?

15 A Yes.

16 Q If -- if that is done and the Board itself in a
17 green sheet indicates that there are particular programs
18 that they would like to see the inmate participate in, when
19 the inmate comes up for reparole will you look at whether or
20 not the inmate has participated in those programs?

21 A Sure.

22 Q Is -- is the fail -- would the failure to
23 participate in any programs that the Board indicated that
24 they wanted the inmate to take into account, would that
25 failure most likely have an impact on the decision of

1 release or non-release?

2 A Again, generally speaking yes. I think that would
3 -- the failure to comply with some recommended program would
4 have some impact.

5 Q Okay.

6 A Perhaps a significant impact depending on the case.

7 Q Okay. And can that be independent of whether or
8 not the Department of Corrections in its own prescriptive
9 programming would -- would normally put an inmate in that
10 program?

11 A Yes, yes.

12 Q So is it fair to say that the Board can,
13 independent of the Department of Corrections, indicate that
14 the Board wants an inmate to participate in a program
15 regardless of whether or not the Department of Corrections
16 wants the inmate to participate in the program?

17 A I think that's accurate, yes.

18 Q If the inmate fails to participate in a program
19 that the Board has said they want to see the inmate
20 participate in, can the inmate still be released by the
21 Board?

22 A Yes.

23 Q Okay. Would it be fair to say that it would be
24 harder for the inmate to get released if they hadn't
25 participated in the program?

1 A I would think in more cases than not if they failed
2 to participate in a program recommended by the Board that
3 more chances than not it would significantly impact on a
4 decision. It would jeopardize their -- their likelihood of
5 being reparaoled.

6 Q Okay. Does the Board occasionally require inmates,
7 if they're revoking parole, to participate in a sex offender
8 treatment program?

9 A Yes.

10 Q Okay. And the sex offender treatment program,
11 that's run by the Department of Corrections; is that
12 correct?

13 A Yes.

14 Q Is -- well, I understand under current law there's
15 certain individuals that are convicted of certain sex
16 offenders now who are not even eligible for parole if they
17 don't --

18 A Yes. And I think -- again, don't hold me on this
19 date, December of 2000, any time after that they must .
20 participate in sex offender treatment.

21 Q Okay. When you get a case where the inmate has
22 been convicted of a sex offense does the file for some -- in
23 some way distinguish for you whether or not this is an
24 individual who's, by law, mandated to do a sex offender
25 treatment program to be eligible for parole versus it's an

1 inmate who has a sex offense but is not required under law
2 to do sex offender treatment to be eligible for parole?

3 A You know, I -- my recollection is that there's --
4 there's nothing that sticks out in my mind that indicates
5 that's -- that it's a mandatory -- that it's that kind of
6 case that you've described.

7 I, by practice, take a look at when the offense
8 occurred and use December of 2000 as sort of the line of
9 demarcation. But I don't recall anything that's flagged for
10 us indicating it's a mandatory case or not for sex offender
11 treatment.

12 And I think it's my understanding -- I believe the
13 practice now is that that would get -- if a person were
14 granted parole and did not participate in that treatment,
15 that will get caught during the chairman's certification
16 process.

17 There's a process that's undertaken before the
18 final approval for parole where all of those mandatory
19 requirements are checked. And I think that's where it gets
20 caught. But on my level I don't recall anything that
21 designates that case as a mandatory sex offender treatment
22 case.

23 Q Okay. In your experience when you get a file to
24 review, a file where the offender has been -- the inmate has
25 been ordered to undergo a sex offender treatment program, is

1 that something you will always check to see whether or not
2 that has actually been done?

3 A Absolutely, yes.

4 Q If you look at the inmate's file and see that the
5 inmate has not completed the sex offender treatment program,
6 will you vote to release the inmate?

7 A In the vast majority I would say that would -- that
8 would greatly impact on their chance of being paroled. I'd
9 be hesitant to recommend them for parole in that scenario
10 generally.

11 Q Okay.

12 A More likely than not. Far more likely than not.

13 Q Okay. Would that be true even if the parole
14 decision making guidelines recommended release or reparole?

15 A Yes.

16 Q And would that be true regardless of whether or not
17 the Department of Corrections recommended release?

18 A Yes, with some hesitation. Because there again
19 every case is on its merit. But that is a substantial
20 hurdle for a sex offender who has not participated in sex
21 offender treatment to be recommended parole.

22 Q Or reparole?

23 A Or reparole. I'm sorry.

24 Q Either case?

25 A Right.

1 Q Can you recall specifically any case in which you
2 have actually voted to release an inmate who has a sex
3 offense who had not participated in sex offender treatment?

4 A My recollection is yes. I do recall -- I don't
5 know if the ultimate decision was to parole, but I do
6 recall, on probably more than one occasion, where I've
7 recommended parole in that scenario.

8 And I don't -- I absolutely don't remember the
9 name, but I believe it was an offender nearing the end of
10 his maximum expiration term. And I believe it was an
11 offender in his early teens, where the offense occurred in
12 his early teens, and the victim was also within a -- around
13 a four year period where the offense occurred.

14 It was, I believe, that sort of scenario, and it
15 was nearing the end of his sentence. And in my judgement I
16 recommended parole for some sort of community -- transition
17 back into the community before his maximum expiration term.

18 I think I've done it before also on -- and this
19 goes back years, on mental health -- on at least one mental
20 health case. Again, nearing the end of his sentence where I
21 thought some -- it was in the interest of community to at
22 least have some sort of supervision prior to the expiration
23 of the max and some sort of trans -- gradual transition back
24 to society.

25 There have been some in my history where I've

1 recommended. Those two scenarios come to mind, jump out at
2 me.

3 Q Okay. Do you recall whether or not those
4 individuals were actually paroled?

5 A No, no.

6 Q After you cast your vote in a case -- and is it
7 accurate to say that in -- for you, you actually cast a vote
8 either in favor of release or in favor of non-release?

9 A I can say -- if I understand your question right,
10 in that sort of scenario where a person didn't participate
11 in sex offender treatment I have cast votes to parole.
12 They're unique cases, but I have done that in the past.
13 That's my recollection.

14 Q After you would -- you would make that vote what
15 process does the file then go through?

16 A It would continue until there were at least five
17 Board -- or the majority of the Board voting to parole the
18 individual or to not parole them. I recall in all the
19 scenarios I was not the final vote. So I can't tell you how
20 many of those cases ended up. But it continues through the
21 process until it achieves the required number of votes to
22 either parole or deny parole.

23 Q So after you get done with the file, be it in the
24 sex -- the two cases that you've talked -- talked about with
25 the sex offender issue.

1 A Um-hum.

2 Q Or any other case after you review the file and
3 either participate in the interview or just do a file review
4 and cast your vote, I guess if your vote puts the person in
5 the majority, does something different happen than if your
6 vote is early enough in the process that there's not either
7 a majority for release or non-release?

8 A I don't know if I understand the question.

9 Q Okay. There has to be a majority of Board members
10 either voting --

11 A Correct.

12 Q -- in favor of release or in favor of non-release;
13 is that correct?

14 A Correct, yes.

15 Q If you are the -- is there any particular order the
16 Board members get the files?

17 A No, not to my knowledge, no.

18 Q So you may be the first one or you may be the fifth
19 or sixth one?

20 A I would be the first one if I were the interviewer,
21 the actual interviewer. But I don't -- I'm sure there's
22 some processing logic, but there's no particular order that
23 I'm aware of.

24 Q Okay. So if -- if you're -- say you do the
25 interview, and so you're the first person -- the first Board

1 member who will vote.

2 A Correct.

3 Q Would it be accurate to say that that file is then
4 going to be circulated to other Board members?

5 A It will continue until it has the requisite number
6 of votes either to -- majority either to parole or to deny
7 parole or reparole.

8 Q What happens when it hits that -- that majority
9 number, be it either to parole or reparole?

10 A Then it's processed accordingly for the person to
11 either be released or informed of the decision.

12 Q Do you ever get any feedback as to whether or not
13 -- in the individual case where you vote early in the
14 process to ultimately find out what happened?

15 A Not -- not typically, no. And I can't recall of a
16 case where I asked to find out how it turns out frankly, not
17 in my recollection.

18 Q Okay. In the two cases that you singled out that
19 you could remember where you had voted for release even
20 though an individual had not participated in sex offender
21 treatment, do you recall -- in those cases have the
22 individuals been told that they needed to participate in sex
23 offender treatment?

24 A Yes.

25 Q And from your explanation of the two cases would it

1 be accurate to say that you saw these individuals as both
2 being close to their maximum dates where they were going to
3 be released anyway?

4 A Yes, that's my recollection.

5 Q And would it be fair to say your logic was it would
6 be better for these individuals to have some supervision
7 while they were out of the institution instead of being
8 released from the institution and then have absolutely no
9 supervision?

10 A That's my recollection, that the cases that I
11 recall -- there may have been others, but the two that come
12 to mind right away, as I recall they were nearing their --
13 their maximum expiration date.

14 Q Okay.

15 A Now, there may have been others. I process
16 literally thousands a year, so -- but those two jump to
17 mind.

18 Q Has the Board promulgated any policies regarding
19 what procedures it will follow in cases in which an inmate
20 is required to participate in sex offender treatment?
21 Meaning that you're told that there's any particular way you
22 have to consider that fact versus the other facts you take
23 into consideration?

24 A We receive training over the years and literature
25 regarding sex offender treatment and -- and studies and

1 research, but I don't believe we've ever developed specific
2 policy, if I'm understanding your question right. I don't
3 believe we have.

4 Q Okay.

5 A Maybe you could rephrase it just so I'm sure I know
6 what you mean.

7 Q Any formal policies that said when you get a file
8 that involves an inmate who has been directed to participate
9 in the sex offender treatment program that there are certain
10 steps that you are to take depending on whether the inmate
11 has or has not participated in the program?

12 A No, not to my recollection, no.

13 Q Okay. Have you had any meetings as the Board and
14 discussed just in general policy terms how you as a Board
15 would take into consideration an inmate's participation or
16 lack of participation in the sex offender treatment program?

17 A Not in policy terms, no.

18 Q Any meetings in -- any discussions regarding --
19 rather than writing policies, just in general as a Board,
20 how you were going to approach the sex offender treatment --
21 or sex offenders and whether they would be released or not
22 released based on their participation in treatment?

23 A Not with that specific issue. Again, I've attended
24 a good deal -- a number of trainings that deal with sex
25 offenders, but no meetings that I recall that that was the

1 specific issue for the Board's discussion. We have
2 speakers, and we have trainings that we attend and plenty of
3 literature, but not to my recollection.

4 Q The training and the literature that you've
5 received on the issue, is that training on how the sex
6 offender treatment program actually works in Pennsylvania or
7 just the theories behind sex offender treatment?

8 A General theories type training, yeah. Also we've
9 had trainings on the approaches of certain treatment
10 providers, that sort of thing. Some of the national trends
11 also with supervision of sex offenders, different types of
12 sex offenders, that sort of thing.

13 Q Would it be fair to say that the failure to
14 participate in the sex offender treatment program would make
15 it at least very difficult for an inmate to be released on
16 parole or reparole?

17 A I think that would be accurate.

18 Q Even if everything else is indicating parole
19 guidelines and Department of Corrections recommendations?

20 A I think there would be a more -- more of a
21 likelihood that a person would not be granted parole in that
22 scenario. But, again, each case is on its individual merit.

23 Q Okay. So without you seeking input on the -- the
24 ultimate outcome of a case you voted on, you have no way of
25 knowing or tracking whether or not somebody who you voted

1 for release on actually ends up getting released or not?

2 A I'm sure there's a mechanism that we could come up
3 with. It may be tedious. It may involve actual hands-on
4 going in the file rooms and -- but I'm not aware of any
5 process that would give those sort of results. What you're
6 asking, can we tell of cases that I voted on how many were
7 actually paroled, that sort of thing, I'm not aware of any
8 process we have that gives us that data.

9 Q Okay. Are you aware of any statistics or data that
10 the Board keeps on the parole or reparole rate of sex
11 offenders?

12 A That's a good question, and I'm not aware of any
13 data off the top of my head. I haven't been in the position
14 where I -- where I'm privy to that information at this
15 point, but I'm not aware of any data.

16 There may be -- that data may be collected
17 unbeknownst to me, but I'm not aware of that occurring at
18 this point. So how many sex offenders -- what's the percent
19 of sex offenders that are paroled each year.

20 Q Right.

21 A What's the percentage of sex offenders that don't
22 complete treatment that are paroled each year. I'm not
23 aware of that data and that statistic being tracked.

24 Q Okay. Are the files that you get to review, are
25 they highlighted in any way as to whether or not the inmate

1 is a sex offender or not a sex offender?

2 A They're highlighted -- the instant offense is what
3 we designate violent or non-violent; but, no, not whether
4 they're sex offenders or not. Of course in the file once
5 you get into the guts of the file, but not flagged right
6 away, no.

7 Q Okay. Now, obviously there are other programs that
8 the Board can recommend that an inmate participate in other
9 than just the sex offender treatment program; would that be
10 accurate?

11 A Yes.

12 Q And if -- if the Board has indicated other
13 programs, such as anger management, that they want an inmate
14 to participate in, when you're looking at a reparole file
15 would you look to see whether or not the -- the inmate did,
16 just for example, the anger management program?

17 A Yes, yes.

18 Q And that would be something that would go into the
19 mix for you when you would be making your decision?

20 A Yes.

21 Q Okay. Would it be fair to say that while there are
22 a number of different programs that inmates can be ordered
23 to take, that the sex offender program and participation in
24 the sex offender program is looked at with more care than
25 participation in other types of programs?

1 A Depending on the circumstances of the case, if the
2 primary offense was a sex offense, I would say that that's
3 accurate. There are some cases where there's a history of
4 sex offense that may perhaps go back a substantial amount of
5 time or that may not be our primary consideration. But if
6 that's the instant offense, then I would say yes.

7 Q All right. Would the same hold true if the
8 original offense was a violent offense but not a sex offense
9 but the reason for violation of parole was the commission of
10 a sex offense and then the Board would order participation
11 in sex offender treatment as a consideration for reparole?

12 A I would say more likely than not, yes. The Board
13 would likely direct that sex offender treatment be part of
14 the programs that the -- the inmate would have to
15 participate in.

16 Q And participation in that particular program, the
17 sex offender treatment program, is probably going to carry
18 more weight, either positive or negative, than participation
19 in other programs recommended by the Department of
20 Corrections just in the prescriptive programming plan?

21 A Again, case by case, but I would say generally that
22 would have a significant impact. That would be the -- one
23 of the primary focuses of our assessment when we consider
24 the case.

25 Q Has the Board promulgated an internal set of rules

1 and guidelines for parole agents and hearing examiners to
2 follow in just doing their day-to-day jobs of preparing
3 files for review by the Board?

4 A Yes.

5 Q Okay. And would it be fair to say that when we
6 talk about agents, the agents can be broken up into what I
7 would refer to as institutional parole agents versus field
8 agents?

9 A Yes.

10 Q And are the institutional agents then, are they
11 involved in getting the file put together and gathering the
12 information that you would need as a member to review in
13 making your decision?

14 A Yes.

15 Q And generally speaking is one area that the
16 institutional agent should be working on with the inmate is
17 getting the release plan put together for the inmate? .

18 A Correct.

19 Q And once the agent works with the inmate to try and
20 get -- get a release plan together, such as where is the
21 inmate -- where would he live, where would he work, that
22 those plans then get sent out to a -- the appropriate field
23 office for a field agent to go out and confirm that that's a
24 suitable place for the inmate to live or it's a suitable
25 place for the inmate to work?

1 A Yeah, that's accurate.

2 Q But has the Board indicated that there are certain
3 situations under which a -- an institutional parole agent
4 does not need to send the release plan out to a -- to a
5 field agent for the field agent to do an investigation?

6 A I can't think of a scenario off the top of my head
7 where there would be a -- a plan submitted, if I understand
8 your question, a plan submitted by an inmate that wouldn't
9 require the field investigated. Is that what you're asking?

10 Q Yeah.

11 A I can't recall of any scenario. If a plan is
12 submitted, the field would investigate it.

13 Q But there's some instances where the -- the
14 institutional agent is not even required to submit it to a
15 field agent for investigation?

16 A I guess I'm -- there's circumstances where the
17 inmate requests to serve his or her entire sentence, in
18 those circumstances.

19 Q Okay.

20 A I can't recall any other off the top of my head.

21 (Page from procedure manual was produced and marked
22 as Deposition Exhibit A.)

23 Q Mr. Martinez, I'm going to show you what was marked
24 as Exhibit A. It was provided to me by Mr. Bradley. My
25 understanding is this comes from the Board's procedure --

1 internal procedure manual?

2 A Out of our manual, okay.

3 Q And you're specifically looking at two exceptions
4 for providing release plan for Board interview?

5 A Yeah.

6 Q Can you just take a look at that?

7 A Okay. Okay. And these, I think, have been revised
8 recently, but I reviewed those, and I think it is accurate.
9 Yeah, there are certain circumstances, for example, when the
10 offender indicates he wants to serve his max, refuses to
11 attend the parole interview, okay.

12 And -- yeah, this refreshes my recollection. We
13 have made exceptions to where the field staff would not have
14 to investigate the plan. And I think these are generally
15 circumstances where generally there would not be a
16 likelihood that the offender would be paroled or reparaoled,
17 okay.

18 Q Okay. So would it be fair to say that as you just
19 mentioned, the specific six circumstances that are listed
20 under 2-A are circumstances under -- that are -- which if
21 they are present, it's very unlikely that the inmate is
22 going to be paroled?

23 A I would say that's accurate.

24 Q And so the reason the Board is then telling the
25 institutional agents that you don't need to send this out

1 for a field interview is to basically conserve resources?

2 A Right. And there are some resource issues. And I
3 think we implemented that in the not too distant future --
4 past, yes.

5 Q Okay. And one of the six specific instances is No.
6 6. Actually it's offender refuses to follow DOC
7 prescriptive programming or has been removed from
8 programming for cause; is that correct?

9 A Correct.

10 Q So if an offender has been told you need to do sex
11 offender treatment program as part of their prescriptive
12 plan from the Department of Corrections, and if the inmate
13 has just not done that, under the Board's policies the
14 institutional parole agent would not be required to send the
15 home plan out for review?

16 A If I'm reading this -- this policy correctly, yes.

17 Q Okay. And I think you had indicated that if any
18 one of these six is actually present in a particular case,
19 the likelihood that that inmate is actually going to get
20 released is very low?

21 A I would say there's a likelihood that parole or
22 reparole would not be granted. Generally speaking again.

23 Q Okay. And because not only -- well, then even if
24 one of these six were involved, if you got the file and then
25 the inmate didn't have a release plan that had been

1 investigated and found to be appropriate, would that in and
2 of itself have a negative impact on --

3 A It depends on the case. I personally in most cases
4 leave that determination to the field to determine whether
5 the plan is appropriate or not.

6 Q But if the field hasn't -- if it's not even been
7 sent out to the field for investigation so that you have no
8 information as to whether or not the plan -- the person can
9 really live at the address that he says he wants to live at
10 or is he going to have a job at the place that he says he's
11 going to have a job, that would -- would that have a
12 negative impact on the decision as to whether to release
13 him?

14 A Not necessarily. Not necessarily. I tend to defer
15 to the judgement of the field on that. So I assume that
16 that's something that will be developed and investigated by
17 the field. And for myself, and again, depending on the
18 merits of the case, that's one factor that I -- that I defer
19 to the judgement of the field, which is probably why I'm
20 fuzzy on -- on the revision of the manual.

21 Q Okay. But the field will -- in these cases that
22 are listed here in this particular --

23 A In these cases, if I -- in these cases the field
24 will not have to investigate the plan.

25 Q Right.

1 A They will not have to expend the resources, the man
2 hours, to actually go out and investigate the plan. Now, if
3 we parole the person, even if these scenarios, they will
4 then have to investigate the plan after parole has been
5 granted, or reparole.

6 Q Okay. Would you believe it to be accurate if
7 wardens from the Department of Corrections or the actual
8 psychologist or mental health workers in the Department of
9 Corrections who actually run the sex offender treatment
10 program tell the inmates that, look, if you've been ordered
11 to take sex offender treatment and you don't take it, really
12 there's no chance that you're going to get paroled?

13 MR. BRADLEY: I'm going to object to the form of
14 that question, but if you understand it.

15 THE WITNESS: I -- I -- if you could rephrase it
16 maybe.

17 BY MR. PATTON:

18 Q Okay. Would you think that the Department of
19 Corrections staff would be -- were wrong if they told
20 inmates in -- in the institution who had been ordered to
21 participate in sex offender treatment that if they failed to
22 participate in sex offender treatment program in all
23 likelihood they were not going to be get paroled or
24 reparoled by the Board?

25 A I hesitate because each case -- the scenarios

1 involve each case and when the sex offender -- when the sex
2 offense occurred. I don't think that's something that they
3 should be telling offenders. It's not necessarily accurate,
4 if I understand it correctly.

5 Q Okay. I know you had mentioned earlier roughly
6 that you see thousands of cases a year. Do you guys have
7 any statistics on roughly how many cases you guys review in
8 a particular year?

9 A Yes. Don't ask me details on that, but we do keep
10 those statistics.

11 Q Can you just give your best estimate of how many
12 files you would review a year for release? I mean, is it a
13 thousand or is it 5,000?

14 A I can tell you how many I interview individually a
15 month. How many I review, I'd have to do the math. Frankly
16 I'm not concerned because some files I spend very little
17 amount of time on. Others I spend considerable amount of
18 time on. I frankly -- that's an area that I don't concern
19 myself with a whole lot. I can tell you how many I see
20 individually a month.

21 Q How many is that?

22 A Typically 15 a day eight or nine times a month.

23 Q Okay. And these are where you're either going to
24 the institution or participating in the interviews through
25 video conferencing?

1 A Correct, correct.

2 Q So that would be roughly 120 interviews a month?

3 A Correct, give or take.

4 Q So just interview-wise then you're talking close to
5 1,500?

6 A Face-to-face interviews roughly.

7 Q And then on top of the face-to-face interviews
8 you're also then reviewing files where some other Board
9 member has actually done the actual face-to-face interview?

10 A Correct, or a hearing examiner.

11 Q Okay.

12 A Or a panel of a hearing examiner and a Board member
13 has done the face-to-face.

14 Q Okay. In -- would it be fair to say that each file
15 that you're reviewing -- well, let me ask you this way. Is
16 there a difference in violent cases or non-violent cases as
17 to the number of Board members that have to review the file?

18 A Yes.

19 Q In non-violent cases is -- how many Board members
20 are required to review files?

21 A Non-violent cases generally two Board members or
22 two agreeing decision makers are sufficient for parole. For
23 a violent file it's a majority of the Board to parole.

24 Q So on a -- on a violent file in a case where you're
25 not the person who does the interview is it possible that

1 you may never see that -- the file of a violent offender
2 who's come up for parole or reparole because enough members
3 have seen it --

4 A Um-hum.

5 Q -- before you that a majority has been formed?

6 A Yes.

7 Q Okay. Other than the two cases that you have --
8 we've discussed on where you can recall sex offender
9 treatment being requested of the inmate and the inmate not
10 participating in, can you recall any other cases that you
11 have participated in either by doing the interview or voting
12 that -- where the inmate was requested to do sex offender
13 treatment program but did not that you voted for release?

14 A Um-hum, um-hum. And I'm thinking of one as we're
15 speaking of an offender where sex offender treatment was
16 required. It was not offered in the county prison. I think
17 I recall a sex offender that had another sentence to turn
18 over to, if you understand what that means.

19 Q Yes.

20 A And I -- I voted to turn that over to another
21 sentence.

22 Q Where he'd be required under the new sentence --

23 A Yes.

24 Q -- to take sex offender?

25 A Yes, yes.

1 Q Okay.

2 A I can't recall any other off the top of my head.

3 Q Okay. So that appears to be a total of four,
4 because we had the two original and then the two more you've
5 just recalled. And I'm not trying to limit you into saying
6 that that's the only four ever, but accurate to say that
7 that's what you can recall now?

8 A Off the top of my head. I'm giving this a whole
9 lot of consideration, and yes.

10 Q So out of the -- then out of the six or seven years
11 or maybe even closer to eight that you've been on the Board
12 in reviewing, you know, at least 1,500 cases a year, and
13 those are just on the face-to-face ones, so the actual
14 number of files you've reviewed has probably been much
15 larger than that?

16 A Um-hum.

17 Q And then you have the fact that there's only four
18 inmates that you can recall who were requested to take sex
19 offender treatment and did not that you voted to release, is
20 --

21 A There could have been many others that I just can't
22 remember. The volume is -- is pretty significant.

23 Q It would seem from those numbers though that the
24 participation or failure to participate in the sex offender
25 treatment program makes it very, very, very difficult for an

1 inmate to get released? Would that be accurate?

2 A I think it's a significant factor generally
3 speaking. But, again, each case may -- has its own peculiar
4 characteristics.

5 Q You mentioned that sometimes you sit in panels when
6 you review a case?

7 A Yes.

8 Q Is that sometimes more than one Board member, or
9 are those panels generally a hearing examiner and a Board
10 member?

11 A Generally a hearing examiner and a Board member.

12 Q Okay. The hearing examiners, are they allowed to
13 actually have a vote, or do they make a recommendation, or
14 how do they -- what input do they get to provide?

15 A Oh, it varies. In the case where the offense --
16 the instant offense is a violent offense it requires five
17 Board members to parole. If the initial two votes are to
18 refuse and one of those votes is a hearing examiner, that
19 vote would count.

20 In non-violent cases their vote would count to
21 parole or to reparole. Then there's scenarios of
22 disagreement with the Board members and the hearing
23 examiners. They're tie breakers. There's a couple
24 variations. Essentially in the case of violent offenders to
25 parole they essentially make a recommendation that requires

1 Board members to parole or reparole those cases. But we
2 designate violent due to their instant offense.

3 Q Okay. And if you are sitting in a panel with a
4 hearing examiner, do you guys conduct the interview
5 together?

6 A Generally one of us will prepare the case, and I'm
7 speaking for myself. The general practice is we'll each
8 prepare a case before the inmate comes into the room. We
9 have a discussion -- case discussion prior to the offender
10 coming into the room.

11 When the offender's in the room and the person that
12 prepared the case is conducting the interview and taking
13 notes the other person is -- is reviewing the file. And
14 then that person will ask follow-up questions. I don't know
15 if that answered your question or not.

16 Q Yeah. And then after the interview do you -- do
17 you and the hearing examiner then discuss the case?

18 A Yes, generally, yes.

19 Q And would it be fair to say most often pretty
20 quickly after the interview you make your decision or --

21 A That's where in my practices that we usually try to
22 make a decision afterwards. Sometimes there's significant
23 discussion. There's not always agreement, though that's
24 again case by case. Some we reach a decision pretty
25 quickly. Sometimes we have to discuss it pretty

1 substantially.

2 Q Okay.

3 A It depends.

4 Q Would an inmate's either participation or failure
5 to participate in the sex offender treatment program be
6 something you would discuss if you're sitting in a panel
7 with the hearing examiner?

8 A Yes.

9 Q Okay. In your experience dealing with the hearing
10 examiners, if an inmate has been requested to participate in
11 sex offender treatment but has not participated in the sex
12 offender treatment, would you as a panel discussing the case
13 is the -- the usual outcome that the discussion is, along
14 with any other factors, that there's no sex offender
15 treatment programming here, and we want sex offender
16 treatment programming and no release?

17 A I would say typically that's a significant factor.
18 I'd say typically that's a significant hurdle generally.

19 Q If the Board has a difference with the Department
20 of Corrections over whether or not treatment's necessary or
21 not necessary, is there ever any discussion between the
22 Board and the Department of Corrections on that or -- or if
23 the Board says we want this treatment, is that pretty much
24 just the end of the way it goes?

25 A We enter into discussions as to why there may be --

1 usually in the case of disagreement why we may recommend a
2 program and the other -- and the Department of Correction
3 may not think it's necessary.

4 In fact, that's a course that we've been following
5 up on more and more recently trying to understand each
6 other's thought process on why perhaps we're recommending
7 sex offender treatment or any other type of treatment and
8 the department may not, if I understood your question
9 correctly.

10 Q Yes. If the Department of Corrections is
11 recommending release on a particular individual, even if the
12 individual hasn't completed the prescriptive programming
13 plan, is that something you can -- you consider in making
14 your release decision?

15 A Yes.

16 Q Do you ever go back to the department to get an
17 explanation of why are you recommending release if -- if he
18 hasn't done all the -- the programs that have been included
19 in the prescriptive programming plan?

20 A There's been occasions where I individually go to
21 the sex offender treatment providers. And we have a pretty
22 good rapport in most institutions that I go to where we may
23 have a discussion about the progress of this -- their
24 progress in treatment, why they may not have been
25 recommended when we felt that -- that they should have

1 participated. There's occasions when we do enter into those
2 discussions. Again, if I understood that right.

3 Q Yeah.

4 A Okay.

5 MR. PATTON: I believe those are my questions.

6 THE WITNESS: Okay.

7 CROSS-EXAMINATION

8 BY MR. BRADLEY:

9 Q I just have a few. Let me start with Exhibit A.
10 And first off, with regard to 2(a)6, which for the record
11 states offender refuses to follow DOC prescriptive
12 programming or has been removed from programming for cause,
13 that scenario is not limited to sex offender treatment, is
14 it?

15 A Oh, no, no.

16 Q And at least in your experience you've indicated
17 that the absence of an investigative home plan would not be
18 dispositive of your parole decision?

19 A Not in mine, no. My practice is, and I think I
20 said it before, I tend to defer to the field for those kind
21 of judgements.

22 Q And finally, you did indicate that persons who may
23 not have a home plan investigated, they're parole eligible
24 -- if they are parole eligible, a decision is still made?

25 A Oh, absolutely.

1 Q And, again, you've indicated that the decision is
2 then made on an individualized basis?

3 A Yes.

4 Q You've talked and interchangeably used terms like
5 significant factor or substantial hurdle with regard to
6 whether an inmate's failure to participate in prescribed sex
7 offender treatment programming would affect his ultimate
8 parole decision. Are there other significant factors or
9 substantial hurdles that you come across?

10 A Many, many other significant factors. And they're
11 all -- I guess there's a laundry list under Section 19,
12 Title -- Section 19 of the Parole Act. I can go down them
13 if you want. We consider the victim input. That's a
14 significant factor. Any recommendations of the sentencing
15 judge or the District Attorney, their institutional
16 behavior, whether we perceive that there's -- that they
17 benefited from the programs they participated in. And,
18 again, it depends on the case, which is where we tend to put
19 more emphasis.

20 Q So in at least those situations you've identified
21 from the inmates perspective if there was negative
22 information regarding those factors, you're indicating that
23 that would also be a significant factor or substantial
24 hurdle to a favorable parole decision?

25 A Yes.

1 Q Would the fact of an inmate's -- and I guess this
2 would obviously be for reparole, an inmate's prior parole
3 failure, would that be a significant factor or a substantial
4 hurdle to a new favorable parole decision, reparole
5 decision?

6 A Yes. And the factors that related to that
7 violation.

8 Q And, again, would that even more so if the parole
9 violation was for commission of and conviction of new
10 offenses?

11 A Yes.

12 Q You had talked also about -- initially it was two,
13 it was the -- the young offender with a young victim within
14 a four year age range nearing the end of his maximum
15 sentence and then the mental health situation where you
16 wanted to transition them back into the community prior to
17 the expiration of the maximum sentence.

18 You had talked interchangeably of those as -- as
19 cases and scenarios. And I just want to be clear, are you
20 talking about there was one young offender and one mental
21 health offender in specific, or are you talking generally
22 these are scenarios where I've come across?

23 A Those are scenarios, and there may have been more
24 than one of each of those scenarios. There may have been
25 others. As I said, I recall at least once. No, at least

1 one, perhaps more, offenders confined in county institutions
2 where the program is not offered or offenders that turn over
3 to another sentence. There's -- there's probably more, but
4 I can't think of any off the top of my head.

5 Q Okay. And we've talked about programming generally
6 and the impact a failure to participate may have on -- on a
7 favorable parole decision, but I don't think we've talked
8 much about why.

9 And maybe if you could spend a few moments and talk
10 about why that becomes a substantial hurdle or why it
11 becomes a significant factor when making the parole
12 decision.

13 A We try to, in our assessment -- or in my assessment
14 of the case I try to focus in on what factors were related
15 to the actual offense, whether there were issues relative to
16 drug and alcohol abuse, the sex offender issues, domestic
17 violence. And there's programmings that -- programs that
18 deal with those specific factors. And if an offender hasn't
19 participated in a program to deal with -- with those factors
20 in this life that lead him to offend, that's why it's
21 significant if they don't participate, if I understand your
22 question correctly also.

23 Q I believe that answers the question.

24 A Okay.

25 Q And I guess going from there I believe from some of

1 your prior answers, I don't know that you said this, but it
2 sounds like you indicated that there may be times when an
3 inmate does complete the prescribed programming and will
4 still not get a favorable parole decision because of -- I
5 guess I'll stop the question there.

6 Are there times when an inmate will complete all
7 his prescribed programming and still get an unfavorable
8 programming decision?

9 A Yes.

10 Q And what would be the reasons for that?

11 A Typically in scenarios where I would feel that the
12 offender has not benefited from those programs, has not
13 gained any incite into his or her pathway to reoffending,
14 where it doesn't appear that they've gotten anything out of
15 it frankly.

16 MR. BRADLEY: I believe that's all the questions I
17 have. He may have some follow ups.

18 MR. PATTON: I don't have any follow up.

19 MR. BRADLEY: Okay.

20 MR. PATTON: We'll just ask that Exhibit A be
21 attached as an exhibit to the deposition.

22 MR. BRADLEY: Just for the record, can we indicate
23 the source of that? And that is -- maybe if you could just
24 read for the record what this document is.

25 THE WITNESS: Yeah. This comes from our manual of

1 operations, Chapter 3 -- from the Pennsylvania Board of
2 Probation and Parole's manual of operation, Chapter 3,
3 Section 3, Procedure 3.4, effective date April 30th, 2004.

4 Is that enough?

5 MR. PATTON: That's fine.

6 MR. BRADLEY: Yeah.

7 (Whereupon, the deposition was concluded at 3:09
8 p.m.)
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1 COUNTY OF DAUPHIN :
2 COMMONWEALTH OF PENNSYLVANIA : SS

3 I, Donna E. Gladwin, a Notary Public, authorized to
4 administer oaths within and for the Commonwealth of
5 Pennsylvania, do hereby certify that the foregoing is the
6 testimony of Benjamin Martinez.

7 I further certify that before the taking of said
8 deposition, the witness was duly sworn; that the questions
9 and answers were taken down stenographically by the said
10 Reporter-Notary Public, and afterwards reduced to
11 typewriting under the direction of the said Reporter.

12 I further certify that I am not a relative or
13 employee or attorney or counsel to any of the parties, or a
14 relative or employee of such attorney or counsel, or
15 financially interested directly or indirectly in this
16 action.

17 I further certify that the said deposition
18 constitutes a true record of the testimony given by the said
19 witness.

20 IN WITNESS WHEREOF, I have hereunto set my hand
21 this 26th day of November, 2006.

22
23
24
25

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Donna E. Gladwin, Notary Public
Susquehanna Twp., Dauphin County
My Commission Expires July 22, 2008
Member, Pennsylvania Association of Notaries

Donna E. Gladwin
Donna E. Gladwin, RPR
Notary Public

of this chapter). An offender can also be designated as hard to place by a PBPP decision maker. Institutional staff will meet with DOC staff to ensure that coordinated release planning efforts begin as early as possible for these offenders. Information on hard to place offenders should be noted in the Parole Plan section of the Summarization report. Each District Field Office has a designated referral specialist who can assist with possible placement for these offenders.

2. Exceptions to Providing Release Plan for Board Interview

a. Investigated Release Plans will not be required if an offender meets one or more of the following criteria.

- 1.) Offender has indicated to parole staff that they wish to serve the maximum sentence. (See Exhibit IV-3).
- 2.) Offender refuses to attend the parole interview.
- 3.) Offender is incarcerated for a violent offense and refuses to attend psychological testing/evaluation.
- 4.) Offender is housed in restricted housing due to disciplinary reasons.
- 5.) Offender has incurred a serious Class 1 misconduct within the past six months for assault, threats to staff or drug use (this includes paroling actions that have been rescinded or suspended and the offender has been ordered to be reviewed on the next available docket).
- 6.) Offender refuses to follow DOC prescriptive programming or has been removed from programming for cause.

b. Release plan information will still be collected from an offender that meets the above criteria. The institutional parole agent will indicate in the Summarization Report what information was received from the offender, that the release plan was not submitted for investigation, and note the reason(s) for non-submission.

3. Time Frame For Submitting Pre-Parole Investigation Request/Report (PBPP-30).

a. At least two months prior to the parole consideration

